

Insurers Entitled to Production of Otherwise Privileged Documents From Underlying Case Where Insurers Provided Defense

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The United States Court of Appeals for the First Circuit has held that under the Massachusetts common-interest doctrine, an insured cannot assert, in the course of coverage litigation, attorney-client privilege and work product doctrine over documents and communications prepared by defense counsel in the underlying litigation, where defense counsel was paid by and also represented the interest of, the insured's primary and excess level insurers. *Vicor Corp. v. Vigilant Ins. Co.*, 2012 WL 883198 (1st Cir. March 16, 2012).

In the underlying action, a purchaser of power converters sued the insured manufacturer in connection with cell phone network outages allegedly caused by the converters' failure. Subject to a reservation of rights, the primary and excess general liability insurers provided a defense for the insured in the underlying action, and the insured ultimately settled with the purchaser. The insured sued its primary and excess general liability insurers for coverage, and after a jury verdict and partial judgment as a matter of law in the insured's favor, the insurers appealed. One of the issues on appeal was the district court's denial of the insurers' motion to compel documents related to the underlying litigation, which were withheld by the insured on the basis of attorney-client privilege and work product doctrine.

The court held that, under the Massachusetts common-interest doctrine, the insured's defense counsel, paid for by the primary insurer, represented both the insured and the insurers, and the communications between the lawyer and any one or more of the clients was privileged as to outsiders, but not as between the insurer and its insured. The court held that the insured could not use the common interest exception to the attorney-client privilege to protect disclosure of communications to third parties and then turn around and assert the privilege against its insurers. The court also held that, in order for documents to be subject to protection under the work product doctrine, the insured must demonstrate that its defense counsel prepared the documents in anticipation of a lawsuit with the insurer. The court held that the district court therefore abused its discretion in denying the insurers' motion to compel, and remanded the matter to the district court for further consideration.